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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. ERLINDO RODRIGUEZ, JR., Defendant and Appellant.	D075138 (Super. Ct. No. FSB1404420)

APPEAL from a judgment of the Superior Court of San Bernardino County, Ronald M. Christianson, Judge. Affirmed in part and reversed in part for resentencing.

Doris M. LeRoy, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Steve Oetting and Paige B. Hazard, Deputy Attorneys General, for Plaintiff and Respondent.

Seventeen-year-old Marcus Green jumped over Erlindo Rodriguez's back fence near where Rodriguez kept his marijuana plants. Seconds later, Rodriguez exited his house with a long rifle, approached Marcus, and immediately shot him in the chest. Rodriguez then dragged Marcus to the alley and left him there. These events were caught on Rodriguez's video surveillance tape.

At trial, it was undisputed Rodriguez fatally shot Marcus. The jury's task was to determine whether Rodriguez committed first or second degree murder, or voluntary manslaughter based on reasonable provocation or imperfect self-defense, or whether he was not guilty based on self-defense. The jury found the prosecution proved second degree murder, and found true an enhancement alleging Rodriguez personally and intentionally discharged a firearm causing Marcus's death. (Pen. Code, § 12022.53, subds. (b)-(d).)[1] The jury also found Rodriguez guilty of being a felon in possession of a firearm. (§ 29800, subd. (a)(1).) The court found true allegations that Rodriguez had four prison priors. (§ 667.6, subd. (b).)

The court imposed a sentence of 40 years to life, consecutive to a four-year term. The 40-year term consisted of 15 years on the second degree murder plus 25 years to life for one of the firearm enhancements (§ 12022.53, subd. (d)).

On appeal, Rodriguez contends the court erred in instructing the jury on voluntary manslaughter and the prosecutor misstated the law during closing arguments. We find no prejudicial error. Rodriguez also requests that we independently review the trial court

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1 Further statutory references are to the Penal Code.

proceedings on his motion to discover law enforcement personnel records. (See *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).) We have done so, and find no error.

On sentencing, Rodriguez contends he is entitled to be resentenced under a recent legislative amendment granting sentencing courts the discretion to strike firearm enhancements. The Attorney General does not oppose this request. We remand for this purpose and to correct errors in the abstract of judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Rodriguez lived in an apartment with his wife Maria, and their five young children. The apartment had a backyard of which Rodriguez and his family had exclusive use. Rodriguez legally grew marijuana in the backyard, and the plants were visible over the fence surrounding the yard.

In the past, people had broken into the yard and stolen marijuana plants, which enraged Rodriguez. He was concerned the perpetrators would continue to steal and he wanted to catch the thieves. Additionally, several months before Rodriguez killed Marcus, an intruder had entered Rodriguez's apartment when his two young sons were home alone. Rodriguez later attacked the suspected intruder after he saw him leaving a neighbor's apartment. As a result of these incidents, Rodriguez added a recording capability to his video surveillance system and was vigilant about locking doors and gates around the property.

As reflected on the video later recovered from Rodriguez's system, on September 29, 2014, about 10:38 p.m.,[2] 17-year-old Marcus (who was about 5 feet 9 inches tall) climbed over the fence into Rodriguez's yard near where the marijuana plants were located. Rodriguez was in his bedroom, and immediately saw an intruder on the video screen. He grabbed a .22-caliber rifle from behind his headboard, loaded it, and ran to the kitchen, where he also grabbed a knife. Armed with the knife and rifle, Rodriguez exited his back door into his backyard. His wife Maria followed.

As Maria stood outside the back door unarmed, Rodriguez moved silently in a crouching position toward Marcus's location while holding the rifle with both hands in a shooting position. Marcus was squatting near the marijuana bushes close to the fence. About three seconds later, Marcus partially stood up and looked toward Rodriguez's location. A witness on the other side of the fence heard Marcus yelling, " '[h]ey, wait, stop,' " and then immediately heard a gunshot. The video showed Marcus putting his hands up near his chest area and starting to walk in the other direction. He then stumbled back toward his original position and fell down on the ground. He did not move after that. Marcus was shot less than one minute after he climbed the fence into Rodriguez's backyard.

Rodriguez immediately grabbed Marcus by his clothing and dragged his body towards the alley. After leaving Marcus's body, Rodriguez stood on a chair in the

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2 The video's time stamp was about 34 minutes fast. Because the exact time is not relevant to the appellate issues, we use the time identified on the video.

backyard near a light bulb and unscrewed the bulb, eliminating light from the area. Rodriguez then ran back into the house.

After a few minutes, Maria went to the alley and shone a light on the body to see whether the boy was alive. After two neighborhood boys identified Marcus, Maria called 911.

When the police officers arrived, Marcus was dead from the gunshot wound to his chest. A pair of scissors was inside Marcus's shirt. Only a "very small portion of the [scissors] handle was protruding from [Marcus's] sleeve."

Rodriguez provided conflicting stories to several different police officers over the course of the night. Rodriguez told one officer he first saw Marcus's dead body in the alley and told Maria to call police. Rodriguez later said he saw the victim's body lying in the road and almost hit it with his truck. During this interview, Rodriguez denied shooting Marcus and denied having any guns in his residence. Rodriguez was later interviewed by Redlands Police Lieutenant Travis Martinez. After Martinez suggested that maybe it was self-defense, Rodriguez admitted shooting Marcus, but said he acted in self-defense after Marcus came toward him. Rodriguez said he saw something in Marcus's hand.

When police officers brought him back to the scene, Rodriguez reenacted the killing and said he fired the gun as he stood 20 feet from Marcus. Rodriguez said Marcus came toward him and the gun then went off.

Defense Case

The defense theory was that Rodriguez acted in defense of his family and property when he killed Marcus. Rodriguez did not testify, but his counsel relied on Rodriguez's statements to police that he fired the weapon only to protect himself and family.

Defense counsel also elicited supporting testimony from Rodriguez's wife Maria. She described the incident in which a man broke into their house several months earlier. Maria said that people regularly stole items from the backyard, including marijuana and their dog, and this made Rodriguez extremely angry.

On the night of the killing, Maria said that Rodriguez heard a noise and went to investigate. Rodriguez did not know how young Marcus was and believed the intruder was intending to hurt him or his family. Rodriguez told Maria he was scared and believed the intruder had a weapon. Rodriguez said he did not want to hurt Marcus. Maria said that after Rodriguez shot Marcus, he wanted to drive Marcus to the hospital and dragged the body to the alley with the intent to load Marcus into his truck. Maria said she convinced Rodriguez not to take Marcus to the hospital because she believed this would "make it worse." Rodriguez's counsel also elicited testimony that the window in the bedroom shared by his daughters, which was closest to where Marcus jumped the fence, did not lock.

During closing argument, defense counsel focused on asserting that Rodriguez had a legal right to go into his backyard with his gun to confront the intruder, and that he shot

Marcus only in self-defense. Defense counsel argued the video showed Marcus moving his hand in a threatening manner before he was shot.

Jury Verdict

The court instructed the jury on first and second degree murder, voluntary manslaughter based on both imperfect self-defense and provocation, and complete self-defense. After deliberating for less than one day, the jury found Rodriguez guilty of second degree murder and being a felon in possession of a firearm, and found true that Rodriguez personally and intentionally discharged a firearm.

DISCUSSION

I. *General Principles of Murder, Voluntary Manslaughter, and Trespass*

First degree murder is an unlawful killing with malice aforethought, premeditation, and deliberation. (*People v. Chun* (2009) 45 Cal.4th 1172, 1181.) Malice may be express (intent to kill) or implied (intentional commission of life-threatening act with conscious disregard for life). (*Ibid.*) Second degree murder is an unlawful killing with malice, but without the elements of premeditation and deliberation. (*Ibid.*) Premeditation and deliberation can be negated by provocation. (*People v. Carasi* (2008) 44 Cal.4th 1263, 1306; see *People v. Jones* (2014) 223 Cal.App.4th 995, 1000-1001.) The court instructed the jury on these principles. (See CALCRIM Nos. 520, 521, 522.)

Even when a defendant has the intent to kill, a murder can be reduced to voluntary manslaughter in limited, explicitly defined circumstances that are viewed as negating malice. (*People v. Moye* (2009) 47 Cal.4th 537, 549; *People v. Lasko* (2000) 23 Cal.4th

101, 107-109.) Malice can be negated by the defendant's (1) "sudden quarrel or . . . heat of passion" arising from provocation that would cause a reasonable person to kill, or (2) " 'unreasonable but good faith belief' " in the need to act in self-defense (imperfect self-defense). (*Lasko*, at p. 108.) On complete self-defense, a killing is justified if the defendant believes he is in imminent danger and needs to use deadly force to prevent that danger; these beliefs were objectively reasonable; and the defendant used no more force than was reasonably necessary. (See *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082.) The prosecution has the burden to disprove beyond a reasonable doubt claims of imperfect self-defense and complete self-defense. (*People v. Rios* (2000) 23 Cal.4th 450, 461-462.) The court instructed the jury on these principles. (See CALCRIM Nos. 570, 571, 505.)

The jury was also instructed on the rights of a possessor of property to defend the property against a trespasser, but was also told that "[d]efense of property, in and of itself, cannot justify the use of deadly force. The use of deadly force is only justified in defense of one's self or others as set forth in the [self-defense instruction]."[3] Rodriguez does not raise any factual or legal challenges to this trespass instruction.

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3 This instruction read: "An owner or person in possession of property has a right to act in defense of that property. . . . [¶] The owner or possessor of real or personal property may use reasonable force to protect that property from imminent harm. [¶] The lawful occupant of a property may request that a trespasser leave the property. If the trespasser does not leave within a reasonable time and it would appear to a reasonable person that the trespasser poses a threat to the property, the lawful occupant may use reasonable force to make the trespasser leave. [¶] If the trespasser resists, the lawful occupant may increase the amount of force he uses in proportion to the force used by the trespasser and the threat the trespasser poses to the property. [¶] Reasonable force means the amount of

II. *Claimed Instructional Errors*

Rodriguez contends the court gave two instructions that communicated incorrect legal principles and confused the jury regarding voluntary manslaughter and the applicability of self-defense and/or imperfect self-defense theories.[4]

A. *"Wrongful Act" Portion of Imperfect Self-defense Instruction*

Rodriguez first argues the imperfect self-defense instruction contained an improper reference to his " 'wrongful conduct.' " This instruction was essentially identical to CALCRIM No. 571. The given instruction read:

> "A killing that would otherwise be murder is . . . reduced to voluntary manslaughter if the defendant killed a person because he acted in imperfect self-defense or imperfect defense of another.
>
> "If you conclude the defendant acted in complete self-defense or defense of another, his action was lawful and you must find him not guilty of any crime. The difference between complete self-defense or defense of another and imperfect self-defense depends on whether the defendant's belief in the need to use deadly force was reasonable.
>
> "The defendant acted in imperfect self-defense or imperfect defense of another if: [¶] 1. The defendant actually believed that he or someone else was in imminent danger of being killed or suffering great bodily injury, and; [¶] 2. The defendant actually believed that the use of deadly force was necessary to defend against the danger, but; [¶] 3. At least one of those beliefs was unreasonable.

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force that a reasonable person in the same situation would believe is necessary to make the trespasser leave. [¶] Defense of property, in and of itself, cannot justify the use of deadly force. The use of deadly force is only justified in defense of one's self or others as set forth in CALCRIM 505." (See CALCRIM Nos. 3475, 3476.)

4 Although Rodriguez did not object to these instructions, an appellate court may review unchallenged instructions if the defendant's substantial rights were affected. (§ 1259.)

> "Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. In evaluating the defendant's beliefs, consider all the circumstances as they were known and appeared to the defendant.
>
> "A danger is imminent if, when the fatal wound occurred, the danger actually existed or the defendant believed it existed. The danger must seem immediate and present so that it must be instantly dealt with. It may not be merely prospective or in the near future.
>
> "*Imperfect self-defense does not apply when the defendant, through his own wrongful conduct, has created circumstances that justify his adversary's use of force.*
>
> "Great bodily injury means significant or substantial physical injury . . . .
>
> "The People have the burden of proving beyond a reasonable doubt that the defendant was not acting in imperfect self-defense or imperfect defense of another. If the People have not met this burden, you must find the defendant not guilty of murder." (Italics added.)

Rodriguez challenges only the italicized paragraph above. He agrees the paragraph accurately states the law, but argues there was no evidence that he acted wrongfully when he went into his backyard.

It is error to give an instruction that correctly states the law but has no application to the facts of the case. (See *People v. Debose* (2014) 59 Cal.4th 177, 205; *People v. Cross* (2008) 45 Cal.4th 58, 67 (*Cross*); *People v. Guiton* (1993) 4 Cal.4th 1116, 1129.) The test is whether the instruction is "supported by substantial evidence, that is, evidence sufficient to deserve jury consideration." (*People v. Marshall* (1997) 15 Cal.4th 1, 39-40); accord, *People v. Williams* (2015) 61 Cal.4th 1244, 1263.)

This test was satisfied here. As reflected on the videotape, Rodriguez walked into his backyard armed with a rifle and then crouched down as he carried the rifle in both hands. Seconds later, he shot Marcus in the chest. He dragged Marcus's body out to the alley without any effort to assist him. He then ran to turn off the light in the backyard. He waited several minutes before allowing his wife to call the police. Once the police officers came, Rodriguez gave several conflicting stories of what occurred, including that he had no idea how Marcus was killed. He asserted his self-defense claim only after this was suggested to him by one of the law enforcement officers and after learning from his wife that the officers found scissors in Marcus's clothing.

Based on this evidence, the jury could reasonably conclude that Rodriguez's actions were wrongful and thus his conduct could have justified an adversary's use of force. Although a person has a right to defend his property, he does not have the right to decide to kill an intruder and then follow up on this intent by sneaking up and killing him without giving him an opportunity to retreat or protect himself. The conclusion that Rodriguez acted wrongfully was supported by numerous facts, including the timing of the events (the fact that he immediately killed Marcus and then showed no concern for his welfare), Rodriguez's many conflicting stories after the shooting reflecting his consciousness of guilt, and his wife's actions in which she stood outside unarmed, supporting that there was no imminent danger to Rodriguez.

Rodriguez contends he did not "forfeit" his complete and imperfect self-defense claims by taking a gun with him into the backyard. (See *People v. Vasquez* (2006) 136

Cal.App.4th 1176, 1178-1180.) We agree with this point. But we disagree that the imperfect self-defense instruction could be reasonably interpreted as suggesting that Rodriguez forfeited his defenses by taking a gun into his backyard. Under this instruction, *if* the jury found Rodriguez acted wrongfully by taking a loaded gun into his backyard *with the intent to immediately shoot Marcus in the chest* and *if* this conduct somehow triggered Marcus to use force against him, Rodriguez could not prevail on claims of imperfect or complete self-defense. This instruction accurately states the law.[5] (See *People v. Enraca* (2012) 53 Cal.4th 735, 761 (*Enraca*).)

Rodriguez's central theme in his appellate briefs is that he did nothing wrong by carrying a gun into his yard to protect his family and then shooting Marcus only because he thought he had a weapon in his hand. If the jury had credited the evidence supporting this theory, the jury could have found Rodriguez not guilty (if it found Rodriguez's belief in the need to defend himself reasonable) or guilty of voluntary manslaughter (if it found Rodriguez's belief unreasonable) under the given instructions. But there was substantial evidence in the record to support a contrary factual conclusion. Although a person generally has the legal right to go into his backyard with a weapon, he does not have the legal right to take a loaded weapon into his backyard with the specific purpose of

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[5] Rodriguez makes clear he is "not" arguing that the jury should have been further instructed on the meaning of "wrongful conduct" and/or the circumstances under which a defendant's conduct "could have been viewed as legally unjustified." In any event, such argument would have been forfeited as it is the obligation of defense counsel to propose an instruction that amplifies another instruction, and no such amplification was proposed or discussed. (See *People v. Estrada* (1995) 11 Cal.4th 568, 574.)

sneaking up on and killing an intruder who is not presently a danger to the defendant or his family. As the factfinder, the jury was charged with reaching factual conclusions as to which scenario it believed. The jury instructions, including the imperfect self-defense instruction with the "wrongful act" paragraph, properly set forth the correct legal principles guiding this determination.

In any event, there was no prejudicial error. Giving an irrelevant or inapplicable instruction is generally " ' "only a technical error which does not constitute ground for reversal." ' " (*Cross*, *supra*, 45 Cal.4th at p. 67.) This is because we are required to assume the jury disregarded factually inapplicable instructions. (See *People v. Chism* (2014) 58 Cal.4th 1266, 1299.) The jury was specifically told: "Some of these instructions may not apply depending on your findings about the facts of the case. Do not assume just because I give a particular instruction that I am suggesting anything about the facts. *After* you have decided what the facts are, follow the instructions that do apply to the facts as you find them." (Italics added.) Based on these instructions, if Rodriguez is correct that there were no supporting facts to show he acted wrongfully when he approached Marcus, the jury would not have applied the instruction.

Further, it is likely the jury ignored this portion of the instruction because there was no credible evidence that Marcus used any force against Rodriguez. As reflected on the video, Rodriguez essentially shot Marcus as soon as he approached him without Marcus exercising any force. Although Marcus had scissors in his possession (likely to cut the marijuana plants) it was undisputed these scissors were found underneath his

clothing, with only a tiny portion of the handle protruding. It was also undisputed that Marcus had no time after he was shot to move the scissors from his hand to underneath his clothing. There was no reasonable support for Rodriguez's statements to the police officers that he thought Marcus had something in his hand and that he was threatening Rodriguez with this item.

Finally, contrary to Rodriguez's assertion, the fact that the jury did not ultimately find the prosecutor proved first degree premeditated murder does not mean the court erred in giving the challenged portion of the imperfect self-defense instruction. The parties are entitled to have the jury instructed on all theories of the case supported by the evidence, regardless of its later findings.

B. *Reasonable Provocation Voluntary Manslaughter Instruction*

Rodriguez next contends the court erred by instructing the jury on the reasonable provocation aspect of voluntary manslaughter. He focuses much of this challenge on the "sudden quarrel" references in the instruction. (See CALCRIM No. 570.)

On reasonable provocation voluntary manslaughter, the jury was instructed essentially identical to CALCRIM No. 570 as follows:

> "A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed someone because of a *sudden quarrel or in the heat of passion.*
>
> "The defendant killed someone because of a *sudden quarrel [or in the] heat of passion* if: [¶] 1. The defendant was provoked; [¶] 2. As a result of the provocation the defendant acted rashly and under the influence of intense emotion that obscured his reasoning or judgment, and; [¶] 3. The provocation would have caused a person

> of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment.
>
> "Heat of passion does not require anger, rage, or any specific emotion. It can be any violent or intense emotion that causes a person to act without due deliberation and reflection.
>
> "In order for heat of passion to reduce a murder to voluntary manslaughter, the defendant must have acted under the direct and immediate influence of provocation as I have defined it. While no specific type of provocation is required, slight or remote provocation is not sufficient. Sufficient provocation may occur over a short or long period of time.
>
> "It is not enough that the defendant simply was provoked. The defendant is not allowed to set up his own standard of conduct. You must decide whether the defendant was provoked and whether the provocation was sufficient. In deciding whether the provocation was sufficient, consider whether a person of average disposition in the same situation and knowing the same facts would have reacted from passion rather than from judgment.
>
> "If enough time passed between the provocation and the killing for a person of average disposition to cool off and regain his or her clear reasoning and judgment, then the killing is not reduced to voluntary manslaughter on this basis.
>
> "The People have the burden of proving beyond a reasonable doubt that the defendant did not kill as a result of a *sudden quarrel or heat of passion*. If the People have not met this burden, you must find the defendant not guilty of murder." (Italics added.)

Rodriguez concedes this instruction accurately states the law, but argues there was "no evidence of any quarrel, or any [heat-of-passion] provocation sufficient to cause a reasonable person to kill . . . ." The argument is unavailing.

On heat-of-passion provocation, there was evidence to support this theory, even if the jury did not ultimately credit this evidence. The evidence showed that Rodriguez ran

out of his home armed with a rifle shortly after seeing the intruder in his backyard on the video monitor screen. During police interviews later that evening, Rodriguez told police that he reacted out of fear because a stranger had entered his home a few months earlier and because he thought Marcus was pointing a weapon at him. He also said he was scared of the intruder because of his size (about four or five inches taller than Rodriguez). Rodriguez's wife told police officers that when other people had previously stolen Rodriguez's marijuana, he became enraged, and was "out of control . . . 'acting like a fucking tweaker.' "

Evidence that a defendant was threatened or disrespected and acted without time to cool off can support a heat of passion defense. (See *People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1140.) Under this principle, a reasonable person can act rashly or without reflection if he or she reasonably believes an intruder was attempting to attack his family. The fact that Rodriguez did not request the instruction does not establish error because voluntary manslaughter is a lesser included offense of murder. (*People v. Duff* (2014) 58 Cal.4th 527, 561.) A court has a sua sponte duty to instruct on lesser included offenses if substantial evidence supports the theory. (*People v. Breverman* (1998) 19 Cal.4th 142, 162.)

It is a closer question whether there was evidence supporting the existence of a "sudden quarrel" between Rodriguez and Marcus to justify including this language in the instruction. But we need not reach the issue because the "sudden quarrel" language was not prejudicial. Based on facts showing the shooting occurred so quickly, it is unlikely

the jury would have found that a quarrel existed, and thus it is reasonably probable the jury would have found this language to be inapplicable to the case. Further, at most, the "sudden quarrel" language would have helped Rodriguez's case because it gave him another potential ground for arguing the killing was voluntary manslaughter rather than murder (a killing during a "quarrel").

Relying on a snippet of the prosecutor's closing argument, Rodriguez argues the prosecutor's statements and the court's ruling on defense counsel's objection to those statements would have "compounded" the jury's confusion about the "quarrel" language. The prosecutor's argument was as follows:

> "The fact that Marcus was there to steal marijuana, that is not enough provocation to kill. [¶] . . . [¶] So we're talking about this is a reasonable standard, person of average disposition. Not an average mad man who couldn't handle somebody stealing his marijuana. Would a person of average disposition in the same situation, knowing the same facts, resort to this type of violence? Does that mean it's okay to get voluntary manslaughter when someone tries to steal your property? You have to look at whether or not the provocation is sufficient.
>
> "Here Marcus—whatever he did . . . was not sufficient to provoke . . . the defendant into killing [him]. *The quarrel is if there was any provocation created when [defendant] came out with a rifle*.
>
> "[Defense counsel]: Objection, your Honor, misstates the law.
>
> "The Court: Read it back to me.
>
> "(Record read.) [¶] . . . [¶]
>
> "The Court: What's the misstatement of the law?
>
> "[Defense Counsel]: My client coming out did not start this altercation.

> "The Court: *Well, it's argument. So instruction regarding who starts the quarrel has been read to the jury, and they can consider the evidence and apply the instruction if it applies.*
>
> "[Prosecutor]: Look at the evidence. He went outside with the rifle. He could have stayed inside. Yet he . . . wasn't facing any imminent threat at the time. He voluntarily went outside with the rifle. *So the People's position is that any quarrel, if there was any, was created when he took the rifle out to the back yard*." (Italics added.)

Rodriguez contends the prosecutor's argument misstated the facts and law because "[t]here was no basis for the jury to find [he] started a 'quarrel' within the meaning of CALCRIM No. 570 when he went into his back yard prepared to defend himself." However, read in context, the prosecutor's statements were fair comment on Rodriguez's claim that he shot Marcus because he was afraid Marcus presented a danger to him or his family. The prosecutor was attempting to explain (perhaps inartfully) his position that there was no reasonable provocation for the killing during this incident, which the prosecutor briefly characterized as a quarrel. The prosecutor did not definitively suggest that the incident was a quarrel; he was speaking conditionally (the quarrel "*if* there was any"). (Italics added.) The prosecutor could reasonably claim that Rodriguez—and not Marcus—triggered the deadly confrontation (or "quarrel") and thus Rodriguez's claims of self-defense and provocation were unwarranted. (See *Enraca*, *supra*, 53 Cal.4th 735 [one who initiates attack may not claim self-defense when victim justifiably fights back].)

Rodriguez alternatively maintains the court prejudicially erred in ruling on his counsel's objection because the jury could have interpreted the court's statements to suggest the "prosecutor's argument presented a tenable theory concerning a 'quarrel.' "

This contention is unavailing. In response to Rodriguez's counsel's objection, the court said the objection was to "argument" and the jury could consider the given instructions. This was an appropriate statement. Interpreted in context, the court's statement did not imply it had made a finding that Rodriguez started the "quarrel" and thus that Rodriguez could not rely on an imperfect self-defense theory. Viewing the entire record, there is no basis to find the court's remark would have confused the jury to believe Rodriguez was legally precluded from claiming self-defense or that the jury should not apply the instructions as given.[6]

III. *Prosecutor's Argument Challenging Rodriguez's Conduct in Confronting Marcus*

Rodriguez next contends the prosecutor engaged in prejudicial misconduct by arguing that Rodriguez acted wrongfully by going outside with a loaded weapon to confront Marcus, rather than staying in the house and calling 911. He claims the prosecutor's argument would have misled the jury as to the legal principles governing a homeowner's rights.

It is improper for the prosecutor to misstate the law. (*People v. Cortez* (2016) 63 Cal.4th 101, 130.) To prevail on a claim of prosecutorial error based on an improper legal argument, the defendant must show " ' "a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." ' "

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6 Although the court appeared to refer to certain pattern instructions that were not given (regarding the consequences of *starting* a quarrel, see CALCRIM Nos. 3471, 3472), there is no reasoned basis for concluding the jury would have been misled by the court's brief remark.

(*People v. Woodruff* (2018) 5 Cal.5th 697, 755; see *Cortez*, at p. 130.) In determining whether this showing has been made, the court must consider the argument as a whole, and not view the challenged remarks in isolation. (*People v. Cole* (2004) 33 Cal.4th 1158, 1203.) The court must also be mindful that a jury is told counsel's assertions are merely arguments and it must follow the court's instructions. (See *People v. Potts* (2019) 6 Cal.5th 1012, 1037.)

Rodriguez contends the prosecutor erred in suggesting that he "was somehow in the wrong, or lost his right to self-defense, when he went armed into his yard." He relies on the prosecutor's statements that it would have been better for Rodriguez to stay in the house and call the police rather than confront the intruder, and on the prosecutor's discussion of the facts showing Rodriguez admittedly was not facing any threat until he approached Marcus. Rodriguez argues that "[t]he message the jurors would have taken" from these and similar statements "was that because [he] made the wrong choice when he went out into the yard he forfeited his right to self-defense."

Rodriguez did not object to the prosecutor's remarks on this basis, and therefore he did not preserve this contention on appeal. (*People v. Tully* (2012) 54 Cal.4th 952, 1010.) Additionally, the contention fails on its merits.

Viewed in context, the prosecutor was explaining that when Rodriguez was inside his home he was not in imminent danger of being killed, and thus his running to the danger with a loaded rifle and immediately shooting Marcus in the chest reflected that he

had already made up his mind to kill the perpetrator by confronting him and triggering the fight. This argument is consistent with applicable law.

As the jury was instructed, a property owner or occupier does not have a right as a matter of law to shoot intruders on his property. A property owner may use reasonable force to compel the intruder to leave, but this right is generally triggered only after the property owner has requested the trespasser to leave and the trespasser does not do so. (See *People v. Hardin* (2000) 85 Cal.App.4th 625, 634, fn. 6; *People v. Corlett* (1944) 67 Cal.App.2d 33, 53; CALCRIM No. 3475.) Additionally, the occupier may use only reasonable force, i.e., the amount of force that a reasonable person in the same situation would believe is necessary to make the trespasser leave. (See *People v. Curtis* (1994) 30 Cal.App.4th 1337, 1360; *Corlett*, at p. 53.) Defense of property cannot justify the use of deadly force; it is only justified in defense of one's self or others as set forth in the self-defense instructions. (*Curtis*, at p. 1360; see *People v. Ceballos* (1974) 12 Cal.3d 470, 478-479.) Moreover, a person who triggers a deadly confrontation generally cannot prevail on a self-defense claim. (See *Enraca, supra*, 53 Cal.4th at pp. 761-762.)

Consistent with these legal principles, the prosecutor's statements criticizing Rodriguez's decision to go into his backyard with a loaded weapon was fair argument. A prosecutor has "wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn . . . ." (*People v. Wharton* (1991) 53 Cal.3d 522, 567.)

In any event, there was no prejudicial error. During his argument, the prosecutor acknowledged that once Rodriguez was outside, he was "entitled to stand his ground, to protect himself," but maintained that "the problem is there was nothing to protect against, to defend against. Marcus didn't do anything to him." Further in his rebuttal, the prosecutor clarified any confusion created during his initial closing argument about Rodriguez's rights to confront the trespasser. He said:

> "Now, the defense said that I was telling you that it's unreasonable for [Rodriguez] to take a gun out to defend his property. *No, that's not what I said. What I said was . . . it was in the context of first degree murder and intent. Intent to kill. When he took the gun out, when he went to grab the gun, load the gun, went outside, that's all intent to kill.* [¶] . . . *That's what I meant.*" (Italics added.)

These additional statements rectified any possible confusion regarding Rodriguez's rights to defend himself. A reasonable jury would not have understood from the prosecutor's statements that Rodriguez's decision to go outside armed with a rifle precluded his self-defense claim. Rather, the jury was told—through jury instructions and argument—that Rodriguez could not prevail on a self-defense theory (complete or imperfect) if the jury found he went outside with a prohibited intent (to kill the trespasser) and then shot and killed the teenager without any reasonable or good faith belief in the need to do so.[7]

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7 Based on our conclusion that the jury was not presented with a legally incorrect theory, we do not reach Rodriguez's argument pertaining to the law applicable when there is one correct theory and one incorrect theory.

IV. *No* Pitchess *Error*

Before trial, Rodriguez moved under *Pitchess*, *supra*, 11 Cal.3d 531 to obtain personnel records from two officers: (1) Lieutenant Martinez, who interviewed Rodriguez in the early morning hours after the shooting; and (2) Police Officer Eduardo Herrera, who assisted in recovering Rodriguez's surveillance tape from his home. Rodriguez argued the materials were discoverable because he believed (1) Lieutenant Martinez falsified the police report and conducted an improper interview after Rodriguez invoked his *Miranda*[8] rights; and (2) the surveillance tape had been altered and Officer Herrera may have been responsible for tampering with the tape. The court found sufficient factual basis for conducting an in camera review regarding (1) Lieutenant Martinez on alleged issues of "withholding evidence or falsification of reports"; and (2) Officer Herrera on alleged issues of "evidence tampering or falsification of reports."

The trial court then conducted an in camera inspection of the complete personnel files of Lieutenant Martinez and Officer Herrera. The court found no discoverable material as to Lieutenant Martinez, but found some discoverable information with respect to Officer Herrera and ordered the admissible information disclosed to defense counsel. Absent any contrary facts, we assume this information was disclosed to defense counsel.

In his appellate brief, Rodriguez requests that we review the sealed in camera materials to determine whether the trial court properly exercised its discretion in

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8 *Miranda v. Arizona* (1966) 384 U.S. 436.

concluding there were no additional discoverable materials. The Attorney General does not oppose this request.

We have independently reviewed the sealed *Pitchess* transcripts and personnel files and find the trial court did not err in concluding there were no discoverable materials in Lieutenant Martinez's file and no additional discoverable materials in Officer Herrera's file.

V. *Firearm-use Enhancement*

The court imposed a 25-year-to-life consecutive sentence for the firearm use enhancement under section 12022.53, subdivision (d). At that time, the court lacked the discretion to strike this enhancement. (Former § 12022.53, subd. (h.) The Legislature has since amended the statute so that now "[t]he court *may*, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section." (§ 12022.53, subd. (h), italics added.) The current iteration further provides, "The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (*Ibid*.) Our court has held that this amendment applies retroactively to all nonfinal convictions. (See *People v. Arredondo* (2018) 21 Cal.App.5th 493, 506-507.)

On remand, the trial court must exercise its newly vested discretion under section 12022.53, subdivision (h) to determine whether to strike the enhancement under section 12022.53, subdivision (d). We express no opinion on how the trial court should exercise its discretion.

VI. *Additional Sentencing Errors*

Rodriguez contends there are several errors in the abstracts of judgment.

First, page one of the Abstract of Judgment (Indeterminate) and page one of the Abstract of Judgment (Determinate) state that the murder and felon-in-possession convictions were the result of a plea. These plea references should be changed to a jury trial.

Second, section 6.c. of the Abstract of Judgment (Indeterminate) states 44 years on the *indeterminate line*. This is erroneous because the court sentenced Rodriguez to a total of 40 years to life on the indeterminate term (15 years to life on the second degree murder count plus 25 years to life on the firearm use enhancement). The additional four years on the priors is a determinate term and was identified on the Abstract of Judgment (Determinate). Thus, the existing abstracts could be interpreted to double count the four-year term. The court should strike the 6.c. number on the Abstract of Judgment (Indeterminate) because the 15-year-to-life and the 25-year-to-life terms are already noted on sections 6.a and 6.b. of this form, and the four-year determinate term is identified on the Abstract of Judgment (Determinate).

Third, Rodriguez objects to the fact that the section 1202.4 restitution fine is listed on both the Judicial Council Forms CR-290 and CR-292. He says this double listing of the $300 fine could result in ambiguity of the total restitution amount. We reject this argument. There is no ambiguity because the statute provides for the restitution fine in "every case," not as to each count. (§ 1202.4, subd. (b).) Therefore, there is no

likelihood the fine would be double counted or considered to be any more than the $300 total amount awarded.

DISPOSITION

The sentence is vacated and the matter is remanded for resentencing. In resentencing, the court shall (1) exercise its discretion under section 12022.53, subdivision (h) to determine whether to strike the firearm enhancement under section 12022.53, subdivision (d); and (2) correct the identified errors by (a) striking the amount set forth on section 6.c. of the Abstract of Judgment (Indeterminate); and (b) noting that the murder and felon-in-possession convictions identified on the Abstract of Judgment (Indeterminate) and the Abstract of Judgment (Determinate) occurred as a result of a jury trial (not a plea). The court is directed to issue the new abstracts of judgment and forward them to the Department of Corrections and Rehabilitation.

The judgment is affirmed in all other respects.

HALLER, Acting P. J.

WE CONCUR:

DATO, J.

GUERRERO, J.